

K8DQusvO

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 US VC PARTNERS GP LLC, et al.,

4 Plaintiffs,

5 v.

19 Civ. 6139 (GBD)  
ORAL ARGUMENT

6 UNITED STATES DEPARTMENT OF  
7 THE TREASURY, OFFICE OF  
8 FOREIGN ASSETS CONTROL, et  
al.,

9 Defendants.

10 -----x

11 New York, N.Y.  
12 August 13, 2020  
10:40 a.m.

13 Before:

14 HON. GEORGE B. DANIELS,

District Judge

15 APPEARANCES

16 LATHAM & WATKINS LLP  
17 Attorneys for Plaintiffs  
18 BY: RICHARD D. OWENS

19 UNITED STATES ATTORNEY'S OFFICE  
20 SOUTHERN DISTRICT OF NEW YORK  
Assistant U.S. Attorney for Defendants  
21 BY: DAVID S. JONES  
22  
23  
24  
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(Case called; in open court)

DEPUTY CLERK: Will the parties please rise and give their appearances for the record, beginning with the plaintiff.

MR. OWENS: Good morning, your Honor.

Richard Owens, Latham & Watkins. With me is Andrew Intrater, one of the plaintiffs.

THE COURT: Good morning.

MR. JONES: Good morning, your Honor.

David Jones, Assistant U.S. Attorney for the Southern District of New York for defendants.

THE COURT: Good morning.

Mr. Owens, why don't I hear from you first.

MR. OWENS: Yes, your Honor. Would you prefer me to address the Court from here or move to the lecturn?

THE COURT: Why don't we try the lectern because I believe we have people on the line who will try and hear us and you will have to speak loudly and into the microphone.

MR. OWENS: Certainly. Thank you, your Honor.

I should begin by apologizing for my technical inabilities, which caused rescheduling and delay of our last scheduled argument. For that I'm sorry for the inconvenience to the Court, Mr. Jones, and others who were in attendance on the line that day.

I think the case here, your Honor, while novel, is simple. It's premised upon very basic laws, particularly the

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1 Fourth Amendment and search and seizure. At the core of this  
2 case is whether or not OFAC's blockings of my client's property  
3 interest and property that is jointly owned with a foreign  
4 national is subject to blocking and seizure in the manner that  
5 OFAC has done it, whether the continuing seizure of that  
6 property is permissible or whether the Constitution requires,  
7 as we believe it does, that the property be restored or at  
8 least those portions that are owned by the Americans be  
9 restored to them promptly, which OFAC has repeatedly refused to  
10 do.

11 So, let me start by outlining for the Court what I  
12 think is the basis of our Rule 41 motion, which I will address  
13 first; and then if it pleases the Court, I will let Mr. Jones  
14 address his motion to dismiss, and then I will respond to that.

15 So, our Rule 41 motion is premised, as I said, on a  
16 seizure. The seizure as outlined in our moving papers was a  
17 blocking order, a series of blocking orders, issued by OFAC  
18 over two years ago, almost two years and three months, in April  
19 of 2018. The orders related to the interests and property of a  
20 foreign national named Viktor Vekselberg for one of his  
21 companies, Renova.

22 And if that were all OFAC did, we wouldn't be here  
23 today, but OFAC has a rule called a 50 Percent Rule, which  
24 subjects property which is owned in an amount of 50 percent by  
25 a foreign national or SDN to the exact same strictures of

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1 property that is 100 percent owned by the foreign national.

2 So, in our situation, we own a portion of property jointly with  
3 this foreign national and were therefore subject under the  
4 50 Percent Rule to the complete and total blocking of our  
5 interests in that property.

6 If I could take a moment to describe, that might be  
7 helpful to the Court, the nature of the property and our  
8 relationship to it, I think it's set up fairly  
9 straightforwardly in our moving papers, in Mr. Intrater's  
10 affidavit, and in our --

11 THE COURT: Is the premise of your motion that I  
12 should hold the 50 Percent Rule is illegal?

13 MR. OWENS: It is the premise of our motion that the  
14 50 Percent Rule is unconstitutional as applied to property  
15 that's owned by U.S. citizens, and that absent a warrant or  
16 some judicial process, the property has to be returned.

17 THE COURT: What you're asking me to do, no court has  
18 ever done.

19 MR. OWENS: That is absolutely correct, your Honor, in  
20 the context of OFAC and the 50 Percent Rule. But it is by no  
21 means unusual for the Court to order the government to return  
22 property that's been seized illegally.

23 THE COURT: There is a process for that though by the  
24 licenses.

25 MR. OWENS: There is, your Honor, and that process is

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1 completely deficient under the basic standards of due process.

2 THE COURT: But you're not here attacking that  
3 process. You're here trying to set aside the 50 percent  
4 blocking rule altogether.

5 MR. OWENS: Well, there are two components to my  
6 argument, your Honor. The first component is that the  
7 seizure -- the initial seizure because of the 50 Percent Rule  
8 and because it is unconstitutional meant that the seizure  
9 violated the Fourth Amendment. That's part one.

10 Part two is even if there were some basis the  
11 government could articulate that that warrantless seizure was  
12 reasonable under the Constitution, it's not reasonable today,  
13 two years and three months later. Both of those analyses we  
14 believe require the Court to find that OFAC's and the executive  
15 branch's conduct here violated the Constitution and our  
16 property should be returned. But the same result should apply  
17 under either argument.

18 If the seizure was initially unconstitutional, we get  
19 our property back. If it's matured into being unreasonable  
20 because it has taken so long for OFAC to act -- and in many  
21 respects today they still have not acted with respect to our  
22 licensing requests -- then we should be restored to our  
23 property rights.

24 THE COURT: Isn't your second argument, isn't that  
25 addressed by the licensing process and procedure and appeals?

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1 MR. OWENS: No, your Honor. And the reason it's not  
2 is threefold.

3 One, because property interests are involved, the  
4 duration of the seizure is important. That's hornbook search  
5 and seizure law.

6 THE COURT: The duration is the same duration whether  
7 or not it is blocked pursuant to the rule or not returned  
8 pursuant to the license.

9 MR. OWENS: The duration in fact vis-a-vis us and its  
10 impact on us is the same, but the constitutional analysis of  
11 what is and is not reasonable differs in both instances.

12 THE COURT: Well, the reason I want to go there first  
13 is because my first analysis is that if the 50 percent blocking  
14 rule is applied, is there a reasonably available process for an  
15 entity or person whose property is blocked under the  
16 50 Percent Rule to obtain that property and is that reasonable  
17 seizure under the license?

18 MR. OWENS: Let me address that directly, your Honor.  
19 The answer is no. The answer is if OFAC's procedures were  
20 analyzed under the principles set forth by the Second Circuit  
21 in the *Krimstock* case which we cited to the Court, these  
22 procedures would undoubtedly fail, and they would fail for  
23 three reasons.

24 One, there is no time limit imposed upon OFAC within  
25 which they have to act on a license. We have multiple licenses

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1 pending before OFAC that have been pending since May of 2018.

2 THE COURT: But then that raises two questions though.  
3 Then isn't that a reasonableness test? And, two, isn't there a  
4 process to appeal the denial of such a return of money pursuant  
5 to a license?

6 MR. OWENS: It would be an avenue of appeal if the  
7 license applications were denied. They haven't been denied,  
8 your Honor. They just haven't been acted on.

9 The Second Circuit said in *Krimstock* that a 24-day  
10 delay in adjudicating and determining whether or not an  
11 innocent owner or someone accused of a crime was entitled to  
12 have their car back when it had been seized by the City of New  
13 York was not sufficiently prompt given the property interests  
14 at stake.

15 THE COURT: But why is that an attack on the blocking  
16 rule itself, the 50 percent blocking rule itself? That's not  
17 an attack on the rule. That's an attack on reasonableness of  
18 acting on the license.

19 MR. OWENS: That is absolutely correct, your Honor.  
20 The relationship between the two is as follows: For the  
21 government to execute a seizure, the government has to have a  
22 warrant. If it doesn't have a warrant, there has to be a  
23 recognized exception, or the test has to be -- or it has to be  
24 subject to a reasonableness test. In determining whether or  
25 not that initial seizure was reasonable, we have to look at

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1 what happens to the person who's property is seized down the  
2 road. They can't be completely separated --

3 THE COURT: But the initial disagreement you have with  
4 them is your characterization of it as a seizure. What you  
5 just -- to block assets, an entity who blocks assets, whether  
6 it's the government or some other entity that is trying to  
7 collect on a judgment, doesn't have to have a warrant.

8 MR. OWENS: That's correct, your Honor. If there is a  
9 judgment, there is court intervention.

10 THE COURT: You don't think that the designation of an  
11 entity being on the OFAC list is as strong as a judgment?

12 MR. OWENS: No, it's not. There is no adjudicative  
13 process. There is no adversarial system. There is no  
14 presentation of evidence by the people whose property is  
15 blocked. There is no record of the decision. There is no  
16 judgment rendered. It is just an administrative action by the  
17 executive branch, and that is not sufficient.

18 THE COURT: But that's an argument that the government  
19 has no authority to block assets, and I'm not sure you are  
20 going that far.

21 MR. OWENS: I am not going so far as to say that the  
22 government does not have authority to block the assets of  
23 foreigners. I'm not even going so far as to say the government  
24 has no authority to block the assets of Americans. I'm only  
25 saying the government's authority to block must be reasonable.



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1 When they block the property of American citizens who are not  
2 themselves SDNs, the government's efforts must be reasonable  
3 within the strictures of the Fourth Amendment.

4 THE COURT: And the unreasonable part of it that  
5 you're identifying is the licensing process or the lack of some  
6 other due process in the block -- in the length of time that  
7 the property is blocked?

8 MR. OWENS: Again, your Honor, there are two aspects  
9 to my argument. The first has to do with the initial seizure,  
10 and the second has to do with the absence of a remedial  
11 procedure afterwards and the duration.

12 THE COURT: So, the initial seizure -- let's start  
13 with initial seizure. The initial seizure the government finds  
14 an entity that they say has assets that should be blocked under  
15 the statute. They block -- their argument is they don't seize  
16 the property. They tell the financial institutions to block  
17 those assets in the sense that they cannot be disposed of  
18 during the period of time that it's blocked. They're not the  
19 government's assets. They're just assets that are frozen. So,  
20 in order to do that, you say that they have to do what?

21 MR. OWENS: Well, would it be helpful first to address  
22 this issue, your Honor, whether or not the law supports our  
23 contention that this in fact was a seizure?

24 THE COURT: Sure.

25 MR. OWENS: Or is your Honor --

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1 THE COURT: Sure, we can address that briefly. I'm  
2 not sure that's determinative, but go ahead.

3 MR. OWENS: There are two cases which I think put to  
4 rest the issue of whether or not what the government -- what  
5 OFAC did here constituted a seizure. The first is *Soldal* in  
6 Cook County, which we cite in our brief, and the second is  
7 *United States v. Cosme*, which, if I were a better lawyer, I  
8 would have found it before we filed our brief, but I have found  
9 it since. And I can either give your Honor the cite or hand it  
10 up. But let me discuss first *Soldal* and the facts of *Soldal*  
11 because they speak to the issue of whether or not seizure and  
12 circumstances where the government doesn't take custody of the  
13 property is nonetheless a seizure within the meaning of the  
14 Fourth Amendment.

15 The facts of *Soldal* were that Mr. Soldal had fallen  
16 behind in his rent payments for his mobile home trailer lot.  
17 The landlord went to court, instituted eviction proceedings.  
18 Before the eviction proceedings had rendered a judgment, the  
19 landlord called the local sheriff's department and said, "I'm  
20 going to remove this guy's trailer. Will you come out and keep  
21 him out of my way while I do it?" And the sheriff's department  
22 did that. They came to the scene. They didn't touch the  
23 trailer. They didn't take the trailer. All they did was tell  
24 the plaintiff, Mr. Soldal, not to interfere while the landlord  
25 carried the trailer away and evicted the man from his

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1 possessory interest in the leasehold in the lot.

2 The Supreme Court -- I believe it was the Seventh  
3 Circuit said there was no seizure here. The Supreme Court  
4 found exactly the opposite and ruled that there was a seizure  
5 within the Fourth Amendment, the state was involved, and  
6 permitted Soldal's 1983 claims to proceed.

7 Here, like in *Soldal*, even more explicitly than in  
8 *Soldal*, the government, like the deputy sheriffs in Cook  
9 County, told the third party "do not let the owner touch his  
10 property." That's what the blocking order does. It would be  
11 one thing if it said "do not let the SDN touch his property"  
12 but it's also saying "don't let us touch his property."

13 THE COURT: But that argument the way you express it  
14 generally would apply to both an entity that they clearly  
15 identified under the statute that economic sanctions should be  
16 imposed against. Your argument would be, well, you can't  
17 impose economic sanctions on anyone.

18 MR. OWENS: No, your Honor, because I'm only  
19 addressing the issue of whether or not it constitutes a  
20 seizure. That doesn't make it per se unconstitutional.

21 THE COURT: That's what I'm trying to understand. Is  
22 your first argument that it is unconstitutional to seize -- to  
23 block property of entities in which the government has imposed  
24 economic sanctions?

25 MR. OWENS: It's improper, yes, to block the interests

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1 of American citizens who are not themselves designated as SDNs.

2 THE COURT: No, that wasn't my question. That's what  
3 I'm trying to understand. You're not making this argument as a  
4 general argument saying that the government doesn't have the  
5 authority without a warrant to block property against entities  
6 that had been determined to be under economic sanctions.

7 MR. OWENS: I'm not asking the Court to go that far.

8 THE COURT: You're saying that they can't do that with  
9 regard to those entities not designated as the target of the  
10 economic sanction.

11 MR. OWENS: Where those entities are American or owned  
12 by Americans and therefore protected by the Fourth Amendment.

13 THE COURT: And you say -- and that's limited to  
14 American -- you're limiting your argument to American citizens.

15 MR. OWENS: I believe it would also apply to people  
16 who are here legally as resident aliens.

17 THE COURT: Well, I'm not sure I understand the  
18 distinction between American citizens, resident aliens, and  
19 others.

20 MR. OWENS: The distinction I'm trying to draw, your  
21 Honor, is simply one that the Constitution protections and the  
22 Fourth Amendment don't extend to everyone in the world, only to  
23 U.S. citizens. And I haven't researched this, but I don't want  
24 to say that I only think it applies to citizens. I think there  
25 are circumstances where the Fourth Amendment's protections

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1 apply to non-citizens who are present here legally.

2 THE COURT: They don't have to be residents here. I  
3 mean, I can be --

4 MR. OWENS: Correct.

5 THE COURT: That's what I was trying to figure out how  
6 you define citizens and residents. I mean, the Fourth  
7 Amendment applies to anyone who happens to be in the United  
8 States and their property is taken illegally.

9 MR. OWENS: Correct.

10 THE COURT: All right. So, you say that --

11 MR. OWENS: Judge, to go back, if I may, to the  
12 seizure point. There is a more recent case in the Second  
13 Circuit that I mentioned before, *U.S. v. Cosme*, where the facts  
14 before the circuit were very much on point to the facts here.  
15 In that case the U.S. Attorney's Office of the Southern  
16 District had, prior to obtaining a seizure warrant, wrote to a  
17 bank and said, "Do not release these funds. We are going to go  
18 get a seizure warrant." And the Second Circuit ruled that was  
19 a seizure within the Fourth Amendment and, furthermore, under  
20 the circumstances in that case it was unlawful because it was  
21 warrantless. The U.S. Attorney's Office didn't follow up  
22 getting a warrant and the bank never released the funds, and  
23 that was part of the problem.

24 But I think those two cases put to rest the issue of  
25 whether or not OFAC's blocking orders are seizure.

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1 THE COURT: Do you have *Cosme*? Did you cite that in  
2 your brief?

3 MR. OWENS: I did not, your Honor. I have a copy for  
4 the Court. And I provided a copy several weeks ago to  
5 Mr. Jones.

6 MR. JONES: Do you happen to have an additional copy?

7 MR. OWENS: The other copy I have is the slip ops, so  
8 the pages are going to be a little bit off. I apologize.

9 So, your Honor, I think that puts -- I don't want to  
10 interrupt your Honor if your Honor wants to read.

11 THE COURT: Go ahead.

12 MR. OWENS: I think that puts to rest the seizure  
13 issue, which now takes us to what I think is the next question  
14 that your Honor wanted to raise, which is why is it that we  
15 think that this blocking order was a violation of the Fourth  
16 Amendment initially?

17 And the reason for that is simply as follows: Your  
18 Honor, it is unreasonable because it is utterly unnecessary.  
19 Why do I say that? Let's imagine in the context of this case  
20 that the SDN's ownership interests in these investment  
21 partnerships was 49 percent. How would the world -- how would  
22 OFAC's rules work? OFAC's rules would work as follows: The  
23 investment partnership itself would not be sanctioned. My  
24 client's property interests would not be affected. My client's  
25 ability to manage the investment funds, to reap whatever

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1 benefits come from that, to take out -- to pay creditors, to  
2 pay salaries, to pay obligations of the investment fund would  
3 be unaffected. He would be, however, completely and totally  
4 blocked from remitting the proceeds of the investment fund, any  
5 dividends, any capital gains, or listening to any directions of  
6 the SDN. The SDN would be blocked out. That's what OFAC's  
7 rules require when there's 49 percent ownership by the SDN.

8           When there's more than 50 percent, different story.  
9 The Americans lose their ability to control the property. They  
10 lose their ability to avoid the economic harm of a downturn in  
11 the economy. They lose the ability to profit from an upturn in  
12 the economy or the value of their assets. They even lose the  
13 ability to do such things as file taxes on behalf of the  
14 entity, to make capital calls that are required to maintain  
15 their investments and to keep them from defaulting on their  
16 debts and their obligations which can wipe out all of the value  
17 underlying assets in a portfolio fund.

18           This Draconian, Draconian impact is prompted by  
19 nothing more than the shift from less than 50, to 50 or more  
20 percent ownership by the SDN, and what OFAC hasn't done in its  
21 responsive papers is to articulate why that is a rational and  
22 therefore reasonable rule. The best the government says is:  
23 We can block things, we have that power, and this gives us a  
24 bright-line test. Yes, but that doesn't mean that you need the  
25 test. They haven't articulated why the test is necessary.

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1 They haven't articulated why the impact on Americans is ever  
2 necessary when the remaining tools in OFAC's arsenal --

3 THE COURT: Well, but they -- the rationale seems to  
4 be not very complex. The rationale is that if there is an  
5 entity that the government has imposed sanctions against and  
6 that entity owns the majority interest in another entity, that  
7 person or entity owns a majority interest in another entity,  
8 that they can block the assets of the entity that they are the  
9 majority stakeholder in. And that is basically the rationale.

10 It's as if to say if you and I decided we were going  
11 to buy a car together, and I put up \$6,000 for the car and you  
12 put up \$4,000 for the car to buy it for \$10,000, the question  
13 is: Is it reasonable for the government to say to me, well,  
14 you know, we're going to not allow you to dispose of this car  
15 because you are the majority owner of this car and we have the  
16 right to block your asset. Why isn't the rationale any more --  
17 why is it more complicated than that?

18 MR. OWENS: For several reasons, your Honor. One,  
19 some of these assets are cash and are therefore readily  
20 divisible such that the interests of the SDN can be segregated  
21 much more than in the case of a car.

22 THE COURT: Right.

23 MR. OWENS: Furthermore, why should the government be  
24 permitted to stop me from driving a car if I own 40 percent of  
25 it and I haven't done anything wrong?



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1           THE COURT: They can't stop you from driving the car.  
2 They're stopping you from selling the car. They're stopping  
3 you from disposing of the value of the car. And the answer to  
4 that question, to the why question is because it gives the  
5 entity or the person who is under sanctions the opportunity to  
6 manipulate that ownership so that you can make -- they can make  
7 the argument that they don't deserve to make -- an argument  
8 that you may deserve to make, but they don't deserve to make  
9 the argument that, oh, look, I'm sorry, I don't own a hundred  
10 percent of this company, I only own 99 percent of this company,  
11 and so, therefore, you can't block the assets of this company.  
12 That seems to me to be the rationale behind it, the reasonable  
13 rationale behind that.

14           MR. OWENS: That may be expedient for the government  
15 to avoid having to deal with those sorts of arguments. It may  
16 be expedient for the government to avoid having to engage in  
17 the factual inquiry to determine whether or not I really have  
18 an ownership interest, but that's not a reasonable basis under  
19 the Fourth Amendment to stop me from driving and using the car.  
20 And it is important to understand, your Honor, that the way the  
21 blocking works as it affects my clients is they can't drive the  
22 car. Not just that they can't sell it. They can't drive it.  
23 They can't use it. They can't change the oil. They can't put  
24 gas in it. They can't even pay the parking lot to keep it out  
25 of the rain.

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1 THE COURT: I'm not sure -- I don't know totally what  
2 property is at issue here. I thought primarily, if not  
3 totally, the property that was at issue here were dollars.

4 MR. OWENS: It's a combination of cash and interest in  
5 other investments, either other companies that they bought  
6 position in --

7 THE COURT: It's ultimately cash.

8 MR. OWENS: It can ultimately be sold and turned into  
9 cash, correct. But it's not just cash. There are stocks in  
10 other companies that are owned. There are interests in limited  
11 partnerships that are owned and things of that nature. It's an  
12 investment fund that holds investments in other entities in a  
13 variety of forms.

14 THE COURT: Isn't the critical question whether the  
15 licensing procedure gives you the opportunity to do exactly  
16 what you say you're entitled to do to demonstrate that your  
17 portion -- to identify your portion of the assets and to argue  
18 to the government that they should give you some ability or  
19 some access to your portion of the assets, and if the  
20 government disagrees, that you have a forum and a process to  
21 resolve that disagreement, that dispute with the government?

22 MR. OWENS: I believe that OFAC could probably create  
23 a licensing regime and regulatory framework that would pass  
24 constitutional muster, and that would make these sorts of  
25 seizures potentially reasonable.

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1 THE COURT: OK. What's wrong with their process other  
2 than you say that they have not -- they're slow to act upon it?

3 MR. OWENS: There is no time limitation.

4 THE COURT: Right. You said they're slow to act.

5 MR. OWENS: There's no requirement that OFAC  
6 articulate the reasons for its decisions. And, most  
7 importantly, your Honor, and what is fundamentally flawed here,  
8 is you can read the entire section of OFAC's regulations in the  
9 CFR, and you will never find the rule or standard by which OFAC  
10 should decide these applications. There is no principled basis  
11 for which or under which OFAC must make its decisions.

12 THE COURT: And have you had in this case applications  
13 that were denied?

14 MR. OWENS: No, applications have not been denied.  
15 They have only been not acted on. So we don't have a right --  
16 some have been granted, your Honor, to be clear.

17 THE COURT: That's what I was going to say. You can't  
18 say -- that's not the facts as I understand them. It's not  
19 that they haven't been acted upon. The ones that have been --  
20 you've requested, there have been a significant amount of those  
21 requests that have been granted, right?

22 MR. OWENS: I would not say a significant amount.

23 THE COURT: Well, I take that back. You've applied  
24 for licenses, and you have -- they have agreed --

25 MR. OWENS: In some limited instances, yes.

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1 THE COURT: But there is no instance where you've  
2 applied for a license and they said no.

3 MR. OWENS: That's correct.

4 THE COURT: But the part that you say is inadequate is  
5 that you've applied for a license, and you've gotten no answer.

6 MR. OWENS: Correct. And there is no time limitation.  
7 That's the first part. The second part we talked about, they  
8 don't have to give a reason for why a license is either not  
9 granted, not acted on, or denied, or granted in a form  
10 different from what you've asked. They don't have to  
11 articulate their reason. But, again, the fundamental  
12 constitutional infirmity from a due process perspective is that  
13 none of this is consistent with the rule of law because there  
14 is no rule that OFAC has to follow. Let me give you I think a  
15 great example from what has happened to us in this case.

16 Shortly before we had oral argument scheduled in early  
17 July, OFAC granted a license that was a wind-down license and a  
18 license that allowed us to get our back-management fees, fees  
19 that we were owed for work that had been done. We had asked  
20 for a certain amount of back-management fees and documented why  
21 we were entitled to that to OFAC. We asked for authority to  
22 wind down these portfolios so that we could put the SDN's money  
23 to one side, take our money, and be done with it, and we asked  
24 for payment of our management fees while we were doing the  
25 wind-down.

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1           What we got was 80 percent of our back-management  
2 fees. No explanation why to this day we're only entitled to  
3 80 percent of our money, why OFAC gets to continue to hold  
4 20 percent of our money. No explanation of why we're not  
5 entitled to management fees while we do the wind-down, none.  
6 And there's nothing in the rule or the statute that requires  
7 that, suggests that, counsels that, mandates or forbids OFAC  
8 from deciding on Tuesday, well, you could have 80 percent; on  
9 Wednesday, well, you could have 70 percent; on Friday, well,  
10 you could have 90 percent. It's a class example of what is the  
11 arbitrary and capricious nature of what OFAC is permitted, not  
12 constrained from, what they're permitted to do under their  
13 statutory regime which makes the licensing process  
14 constitutionally insufficient as a matter of due process.

15           THE COURT: Well, you don't say to me that you  
16 appealed that determination and you've gotten some sort of  
17 adverse decision of your appeal. You can't just say -- if  
18 there's a process and a review process, you can't just say to  
19 me that the system doesn't work because they said no, and you  
20 didn't seek review of that determination and make the same  
21 arguments that you're making, the specific arguments about the  
22 specific decision in that process.

23           MR. OWENS: I believe I can, your Honor. I believe I  
24 can, because what I'm challenging is the structural inadequacy  
25 of the regulatory scheme from a constitutional perspective.

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1 THE COURT: How have you suffered from that inadequacy  
2 if you haven't utilized the process that's available to you to  
3 right that situation?

4 MR. OWENS: Well, partly because we have -- we came to  
5 this court a year before OFAC took this action and began this  
6 action to try to get our property back, and it sort of puts us  
7 in a weird position that having challenged OFAC in court  
8 because of the constitutional infirmity of the structure of  
9 their statute, they can give us a license a week or so before  
10 an anticipated oral argument date and then use that to claim  
11 this issue isn't ripe before the court.

12 THE COURT: I know, but you're giving me two sets of  
13 inconsistent facts. Either you've asked for a license and it  
14 has been denied or you haven't asked for a license that has  
15 been denied. You say to me, well, they haven't acted on  
16 certain requests, but they've agreed to other requests. And  
17 then I asked you, well, was there any request that you made  
18 that was denied, and then you say, well, they gave us  
19 80 percent instead of a hundred percent.

20 MR. OWENS: Well, your Honor, to be clear, these  
21 various licenses deal with different pieces of property and  
22 different businesses.

23 THE COURT: I understand that. So has there been an  
24 adverse determination in the licensing process in which you  
25 requested something and it was denied and you sought review of

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1 that determination?

2 MR. OWENS: Yes, there has been something that was  
3 denied. We have not sought administrative review.

4 THE COURT: Is there a reason not to seek  
5 administrative review?

6 MR. OWENS: Because we had this case pending before  
7 your Honor before those denials and believed that this was an  
8 adequate forum for us and the government to resolve the  
9 constitutional claims and that the claims -- because the nature  
10 of the claims had to do with the structure of the statute and  
11 the regulations and the infirmity on the face of those, that  
12 the issue was ripe for this Court to address.

13 THE COURT: But the only infirmity that you are  
14 articulating is that there isn't an adequate standing because  
15 you're not arguing that you're here because you're seeking  
16 review of a particular adverse determination.

17 MR. OWENS: Correct.

18 THE COURT: You're here saying, well, we don't think  
19 we even have to do that under the review process because we  
20 think since they don't have a reasonable standing that they  
21 should, as they say, throw out the baby with the bath water.

22 MR. OWENS: Yes, your Honor, absent a reasonable  
23 standard to make the decisions under the licensing application  
24 process, the licensing application process does not pass  
25 constitutional muster and does not otherwise provide a remedy

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1 that saves a warrantless search from violating the Constitution  
2 and the Fourth Amendment.

3 THE COURT: So, what are you supposed to  
4 demonstrate -- and I'll ask them the same thing -- what are you  
5 supposed to demonstrate in order to convince them to grant you  
6 a license?

7 MR. OWENS: I have no idea because they have no  
8 standard that they've published at all. I don't know why they  
9 gave us 80 percent rather than a hundred percent of our  
10 management fees. I don't know why they don't permit us to take  
11 management fees going forward.

12 An example of what strikes me as a completely  
13 reasonable request made and not acted on since, I believe, May  
14 of 2018 is a request to make a capital call. Some of our  
15 investments are in limited partnerships, and when you make that  
16 investment, you are required over time to put more money into  
17 that investment to keep it going when you get "capital call"  
18 from the general partner. If you don't make that capital call  
19 when requested, your entire interest can be forfeited by reason  
20 of your failure to make the capital call.

21 THE COURT: You're not saying they prevented you from  
22 making the capital call.

23 MR. OWENS: They just haven't acted on it.

24 THE COURT: I'm not sure what it is under the capital  
25 call, that you have to add assets just like a margin call.



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1 MR. OWENS: Yes.

2 THE COURT: So you could get -- the fact that you have  
3 to do that doesn't necessarily mean that that asset has to come  
4 out of any particular entity.

5 MR. OWENS: Yes. It has to come out of the investment  
6 fund.

7 THE COURT: Well, why? It comes out of your pocket,  
8 right? I mean, there's nothing that says it has to come out of  
9 the investment fund. The thing -- the reason I raise that is  
10 because the thing I didn't understand is -- I understand about  
11 the management fees, but the management fees aren't classic  
12 assets. They're owed. They're a debt that's owed. The  
13 management fees is something that you earned that you say  
14 should be paid. Now, I understand the process that you -- the  
15 usual process is you get paid out of the assets of that entity,  
16 but there's nothing that prevents the entity that is under  
17 economic sanctions to pay you from another fund your management  
18 fees.

19 Management fees that are earned, you know -- I mean,  
20 that's like saying if I mow your lawn and you owe me 50 bucks  
21 for mowing your lawn, that that money has to come out of your  
22 Chase bank account. No. It's an obligation you owe me. It  
23 doesn't have to come out of any particular fund. There may be  
24 a process -- that's the usual process that it just comes out  
25 when you distribute those funds, but that's just an obligation.

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1 That's not part of the asset. The management fees aren't part  
2 of the assets of that company that's being blocked or the  
3 assets that are being blocked. You're just saying, well, I  
4 want that money -- I want to get paid out of that fund, but  
5 that's not the asset itself.

6 MR. OWENS: My argument from a legal perspective and a  
7 constitutional perspective is a little more subtle, your Honor.  
8 It's not that we're entitled to get it out of that fund because  
9 that's our assets. The argument is we are the general partner  
10 of the investment fund --

11 THE COURT: Right.

12 MR. OWENS: -- as well as the manager. As the general  
13 partner, our property interests include our ability to control  
14 the fund.

15 THE COURT: Right.

16 MR. OWENS: Including paying its assets out, using its  
17 cash to pay its expenses, one of which is our own management  
18 fees. That's our contractual right. It's our property  
19 ability. The management fees are the contractual right of the  
20 management company. The ability to direct the funds to make  
21 the payment is a property right, the right of control of  
22 possessory interest of the GP.

23 THE COURT: But that obligation is the obligation of  
24 the partnership.

25 MR. OWENS: Correct.

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1           THE COURT: And the partnership of which the entity  
2 that is under economic sanctions owns the majority of that  
3 asset.

4           MR. OWENS: Correct, but why may we not pay -- make  
5 the decision given our property interests, our right of  
6 control, why can we not make that decision? That is what we  
7 have been divested of here. It's not sufficient to say to us  
8 that we could just go get money from somewhere else.

9           Under the Fourth Amendment, imagine a man who's  
10 standing outside of his house, who wants to go in his house and  
11 the police have told him you can't go in your house, and he  
12 goes -- because we're going to go get a search warrant. And he  
13 goes to court and says, "Your Honor, the Fourth Amendment  
14 allows me to go inside my house," and the judge said, "You  
15 know, sir, just go to a hotel. We'll worry about it later.  
16 Get somebody to find you a hotel room. There are plenty of  
17 houses in this town. What's the big deal there?" The big deal  
18 is the Fourth Amendment doesn't work that way, your Honor. The  
19 Fourth Amendment says our property is our property unless the  
20 government has a reasonable basis to take it from us.

21           THE COURT: But your property here -- the difference  
22 between the analogy you're trying to draw is we're talking  
23 about joint property and we're talking about joint property in  
24 which the entity that's under economic sanctions owns the  
25 majority of that property.

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1 MR. OWENS: And let's say I'm a tenant by the  
2 entirety, and my wife is in big fat trouble, and the cops won't  
3 let me in. And the court says, "Sorry, your wife's in big fat  
4 trouble, find a hotel room, because she owns 50 percent."

5 THE COURT: There are circumstances where that is  
6 appropriate. If we think your wife is a drug dealer and she's  
7 got drugs in the house, and we find out it's her house but she  
8 jointly owns it with you, the government can say, "No you can't  
9 go into the house until we decide what we're going to do with  
10 what we suspect are her illegal assets in the house."

11 MR. OWENS: That is absolutely correct, your Honor,  
12 subject to some very important restrictions on the government's  
13 exercise of that power that are not present here. There is a  
14 requirement that there is a judicial finding of probable cause  
15 provided that each of the factual predicates your Honor laid  
16 out was true. There is a right to contest it through Rule 41  
17 afterwards if the person believes -- if I believe having been  
18 excluded from my house that this was done in error, and there  
19 is a standard, a clear legal standard about when the government  
20 can and can't do that. All of those things are missing here,  
21 and that's why this violates the Fourth Amendment.

22 THE COURT: And are you relying on Fourth Amendment  
23 law in the criminal context or are you relying on some other  
24 broader application of the Fourth Amendment?

25 MR. OWENS: Your Honor, the Fourth Amendment is the

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1 Fourth Amendment. Whether it's a criminal context or a civil  
2 context, it applies the same standards and requirements. That  
3 is clear from the case I discussed earlier, *Soldal*. There was  
4 nothing criminal involved in *Soldal*. It was a civil eviction  
5 proceeding. There is no difference in the limitations the  
6 Fourth Amendment imposes upon what the government can seize and  
7 not seize in a criminal case versus a civil case. The analysis  
8 of what is and is not different may be -- sorry -- what is and  
9 is not reasonable may be different in a civil case from a  
10 criminal case.

11 Typically, in a criminal the case the government's  
12 required showing is a little easier for the government because  
13 criminal enterprises, criminal conduct, public safety are often  
14 an imminent risk, as your Honor just alluded to in the drugs in  
15 the house. Public safety is imminently at risk. Public safety  
16 here is not imminently at risk. There is no criminal conduct  
17 we are alleged to have engaged in.

18 THE COURT: But, I mean, it's not the allegation even  
19 in the criminal context that you are engaged in the illegal  
20 activity. And, quite frankly, I'm not sure I can say that  
21 behind all economic sanctions imposed by the government there  
22 isn't criminal conduct behind some of those sanctions.

23 MR. OWENS: That is absolutely true in many sanctions.  
24 It's not true here. It's not true in the sanction program  
25 which resulted in the seizure of our assets. The seizure of

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1 our assets were part of the Ukraine sanctions program, which is  
2 a foreign policy program. It's not a terrorist program. It's  
3 not a drug-trafficking program. There are such sanctions  
4 programs. The analysis of what is or is not reasonable could  
5 be different in those programs, but that's not what we have  
6 here. And that's why the 50 Percent Rule, I think, your Honor,  
7 deserves rigorous scrutiny from the Court about why it is  
8 necessary when it imposes such immense obligations and such  
9 immense impairments on American citizens and their property  
10 rights.

11 It's one thing to take the position as the government  
12 has, and that I wouldn't disagree with, that sanction programs  
13 are important. The government needs the ability to use the  
14 sanctions tool for a variety of foreign and domestic policy  
15 regimes, but it is not sufficient to say that that tool can be  
16 wielded by the government with as little regard for the rights  
17 of American citizens who are not themselves subject to  
18 sanctions as the government has done here.

19 THE COURT: So, what do you say is the solution?

20 MR. OWENS: The solution is to tell the government  
21 that as applied in this case, the 50 Percent Rule is  
22 unconstitutional. It is unreasonable. It works an  
23 unreasonable restraint on the property of Americans. We will  
24 then be in the same position as we would have been if the  
25 ownership was 49 percent. We are prohibited under penalty of

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1 law from remitting any benefits or proceeds from the management  
2 and operation of the investment funds to the SDN, but we can  
3 manage the fund as we see fit. We can dispose of the assets.  
4 We can take our share, and we can keep them from declining in  
5 value and try to maximize their value, and we can pay ourselves  
6 our management fees, keep our people on the payroll, keep the  
7 lights on.

8 THE COURT: It is unclear to me what is the --  
9 practically, what is the unreasonable restriction at this point  
10 that is being imposed?

11 MR. OWENS: So, for example, it's unclear that we can  
12 make these capital calls.

13 THE COURT: When you say it's unclear --

14 MR. OWENS: Yes, because --

15 THE COURT: You attempted to do so, and they blocked  
16 your ability do so?

17 MR. OWENS: It doesn't work that way, Judge.

18 THE COURT: That's what I'm trying to understand how  
19 it works.

20 MR. OWENS: The way it works is you go to the bank and  
21 you say to the bank, "Will you release these funds to pay X?"  
22 And the bank will say, "You've got to talk to OFAC." And then  
23 we call OFAC and OFAC says, "Well, I don't know about making a  
24 capital call. We'll get back to you." And they never get back  
25 to you.

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1 THE COURT: OK.

2 MR. OWENS: Or they say, "Call our compliance  
3 hotline," and you call the hotline and they say, "We'll get  
4 back to you."

5 THE COURT: I'm trying to understand if you're giving  
6 me a real situation or a hypothetical.

7 MR. OWENS: I'm giving you a real situation.

8 THE COURT: Is this what has happened?

9 MR. OWENS: Yes, this is what has happened. This is  
10 the impairment that we have been trying to function under and  
11 keep from having to lay off everybody who works there, although  
12 many have had to be laid off over the last two years and three  
13 months since these sanctions have been imposed. We had  
14 opportunities -- before this license was granted in July there  
15 were opportunities where people came to us and wanted to buy  
16 assets, and we said, "We can't talk to you. We can't even  
17 negotiate on behalf of the investment funds or deal with you  
18 without a license because the fund is blocked."

19 THE COURT: But in those instances, did you seek such  
20 a license?

21 MR. OWENS: In instances, we did. Some were acted on.  
22 Some were never acted on. In other instances where we sought a  
23 license, our license was never acted on, but the third party  
24 who wanted to acquire the assets, their license was acted on,  
25 and we said to OFAC, "Well, if we're selling this asset out of



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1 the fund, can we use the proceeds from that sale to pay our  
2 management fees?" No. "Can we use the proceeds to pay out our  
3 20 percent interest in the fund that we're entitled to as a  
4 general partner?" No answer. That's the world we have been  
5 working under, your Honor. It's an unfair and unrealistic  
6 world.

7 THE COURT: I understand your position with regard to  
8 a request that is never responded to. But I don't hear -- it's  
9 unclear to me as you go back and forth whether or not you've  
10 ever received a no from the government.

11 MR. OWENS: May I have one moment, your Honor?

12 THE COURT: Yes.

13 (Pause)

14 MR. OWENS: Thank you, your Honor.

15 My client has reminded me of two instances where we  
16 were told no. One involved a license granted to a third party  
17 to purchase the interest of Audubon, which was the entity that  
18 had loaned money to the prince heirs, and we asked that in the  
19 context of that license, we be permitted to receive our share  
20 of the proceeds of the sale, and the answer was no.

21 There was another instance where when an asset called  
22 MapAnything was sold, we asked for permission to pay ourselves  
23 back-management fees out of the proceeds from that sale.  
24 Again, the answer was no.

25 THE COURT: Let me hear from Mr. Jones.

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1 MR. OWENS: Thank you, your Honor.

2 MR. JONES: Thank you, your Honor.

3 And may it please the Court, I have to say that was a  
4 very lengthy and wide-ranging discussion. And I want to be  
5 helpful to the Court, and I will honestly say there is a lot  
6 that surprised me greatly in this discussion, and I feel a lot  
7 of discussion that is really kind of divorced from reality or  
8 at least certainly from how the government perceives this  
9 situation. So, if it's helpful to the Court, I would like to  
10 make a few points.

11 First, very specifically, I think your Honor's  
12 questions were very well taken about whether plaintiffs have  
13 pursued available remedies when told no; have pursued a firm no  
14 if they have an ambiguous answer; have sought review of adverse  
15 decisions, because the answer is they have not. And there is  
16 an important doctrine, I'm sure familiar to the Court, called a  
17 Constitutional Avoidance where parties are expected to pursue  
18 all non-constitutional remedies first before asking courts to  
19 take the profound and weighty and very consequential step of  
20 ruling executive action unconstitutional, and that's especially  
21 critical in this context where we have a challenge to the  
22 working of long-standing sanctions regimes that have been a  
23 cornerstone and a court-approved cornerstone of American policy  
24 and national security efforts for many, many decades. So, the  
25 plaintiffs are trying to bypass viable and available and

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1 effective processes and come to this court and get a ruling  
2 that can have very sweeping and harmful programmatic impact,  
3 and that should not be permitted. I recognize their cripples  
4 and I'll talk about whether available processes are in fact  
5 viable, in fact are appropriate, and in fact are feasible and  
6 available to them, and I'll explain why the answer is yes.

7 I'm also concerned that plaintiff's arguments and  
8 presentation ignore facts, both as alleged in their complaint  
9 and then as have developed since the filing of the complaint,  
10 and I guess I'm responding in part, or at least in part, to the  
11 motion for turnover of assets. So I guess I'm not fully  
12 confined to the four corners of the complaint.

13 But OFAC tells me they have issued at least 29  
14 separate licenses involving the blocked property of Viktor  
15 Vekselberg that is at issue in the complaint. I'm going to  
16 talk about that and how that has worked. The picture is not  
17 nearly as bleak as plaintiffs paint.

18 I do want to talk about my motion to dismiss. There  
19 is really a fundamental disconnect that we do not agree that  
20 OFAC took any action with respect to any property interest of  
21 plaintiff. They blocked Viktor Vekselberg and his companies,  
22 and the 50 Percent Rule -- sorry -- the effect of that blocking  
23 of Mr. Vekselberg and his entities is to make it unlawful for  
24 transactions to occur involving his property. And what the  
25 50 Percent Rule does is simply definitional. It creates a

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1 bright-line rule so that everyone dealing with any assets in  
2 the neighborhood of Mr. Vekselberg will know if it's 50 percent  
3 or more owned by him, it's just automatically by operation of  
4 law deemed his for purposes of the sanctions programs. That's  
5 what that does. That's reasonable. And I can talk about the  
6 operation of that and how that is made to be -- what  
7 protections are in place for U.S. persons with interest.

8 I also note again in connection with the  
9 50 Percent Rule, we don't concede that anything constituting  
10 plaintiff's "property" actually was affected by this. What was  
11 affected by the blocking of Mr. Vekselberg is plaintiff's  
12 entitlement to be paid out of these entities. And, in fact,  
13 OFAC would license payments by any other pot of money to  
14 plaintiffs on account of amounts owed to them by Mr. Vekselberg  
15 or his entities. Plaintiffs have never accepted that as a  
16 viable alternative. Assuming Mr. Vekselberg were to pay, that  
17 would presumably come from funds that he has offshore, and he  
18 is reportedly a multibillionaire with assets all over the  
19 world. OFAC is prepared to facilitate a make good payment to  
20 plaintiffs of whatever amounts are due to them as long as it's  
21 not coming from blocked funds. OFAC doesn't want blocked funds  
22 to be depleted by allowing plaintiffs to tap into those, and  
23 they're encouraging him to pursue other sources of payment.

24 THE COURT: I'm not sure how -- I don't understand how  
25 you are handling his ownership interest in these entities. I

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1 understand your argument with regard to payments owed to him,  
2 but he has an ownership interest in property that has been  
3 blocked, and his argument is that he has lost control over  
4 making those entities profitable or disposing of those -- his  
5 interest in those entities if that's appropriate.

6 MR. JONES: Understood, your Honor. I want to say at  
7 least two things about that, one of which may be a curve ball,  
8 but I'm going to start with it anyway. And that is in just  
9 preparing for today, I looked back at the complaint to see in  
10 paragraphs 44 through maybe 59 or so, defined -- actually, more  
11 than that -- define the parties -- the plaintiff's entitlements  
12 as against these blocked entities, and, for example, they  
13 follow the same drafting pattern. And your Honor is right  
14 that, for example, paragraph 45 talks about plaintiff having --  
15 serving as management company for a Vekselberg-owned entity and  
16 talks about management fees and entitlements like that. So,  
17 that's the easy part.

18 And paragraph 44, the immediately preceding paragraph,  
19 does not say plaintiff US VC GP is a minority owner. They say  
20 that plaintiff is entitled to a minority share of the proceeds.  
21 It's unclear to me if that is a direct ownership interest or if  
22 it's some contractual interest entitling them to a cut of the  
23 proceeds.

24 They follow that drafting exact wording in describing  
25 every single transaction. So, I don't want to bog the Court

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1 down on that excessively, but I do want to point out that there  
2 is not necessarily an allegation that plaintiffs actually own  
3 these entities or have an ownership interest in these entities.  
4 Now, if they do, and certainly, I have great respect and long  
5 familiarity and friendship with Mr. Owens, so assuming there is  
6 a minority ownership interest there, despite their complaint's  
7 wording, what is being -- you know, their actual ownership  
8 interest in the entity has not been acted on by OFAC. They are  
9 just unable to receive payments on account of whatever their  
10 interest is or entitlement are, and that's different in OFAC's  
11 view.

12 THE COURT: But they're also unable to dispose of  
13 their interest --

14 MR. JONES: Thank you. And let me address that.

15 THE COURT: By selling or --

16 MR. JONES: Right. Their complaint is twofold.  
17 Basically, it's "we can't get money out of these things" and  
18 "we can't run them the way we want to do." And it is true part  
19 of the effect of sanctions is that U.S. persons aren't entitled  
20 to provide services to these blocked entities without a  
21 license. That's just part of how the sanctions work. It's  
22 because it's not targeted at the U.S. person; it's targeted at  
23 the blocked person, and so, you can't benefit from the U.S.  
24 economy, you're sanctioned. You know, you are an engine of a  
25 national emergency, and you're not allowed to benefit from our

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1 economy unless we say so.

2 But this is -- when I referenced that OFAC tells me  
3 they've issued 29 licenses, and Mr. Owens acknowledged multiple  
4 licenses early on at a granular level permitting sometimes  
5 third parties to engage in negotiations, sometimes permitting  
6 plaintiffs to engage in negotiations, OFAC adopted a pattern of  
7 authorizing negotiations toward eventual resolution or sales of  
8 portfolio companies held in these blocked entities, while  
9 reserving the ability to approve or disapprove the final deal  
10 that was negotiated.

11 That is not the act of a regulator, and the complaint  
12 doesn't support the view that OFAC was completely handcuffing  
13 these folks, although I know their feelings are very strong,  
14 and they are very frustrated by the impact of sanctions on  
15 them, but OFAC did not act in a way that was intended to or  
16 that did preclude all activity regarding these investments. If  
17 they have particular disagreements, they could have challenged  
18 it and should have in the ordinary course, including through  
19 litigation.

20 If they weren't allowed to make a capital call -- and  
21 I'm unfamiliar with that specific example -- they could and  
22 should have pursued -- gone back to OFAC and said, "Look, this  
23 needs to happen, this is harming me." And if they got a no or  
24 if they could say I will construe this as a no unless I hear  
25 from you by day X, they could have gone to court to challenge

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1 what then would have been a final adverse agency action under  
2 the APA. But they didn't wait for that.

3 So OFAC has not been non-responsive. They did  
4 issue -- and I also want to acknowledge frustration, yes,  
5 dissatisfaction with how OFAC handled things, yes, but OFAC has  
6 given these plaintiffs very extensive attention over a  
7 continuous period, and, importantly, these licenses that were  
8 issued this year provide even more sweeping relief. Plaintiffs  
9 over time have been licensed to receive payouts totaling by my  
10 math approximately \$11 million in several installments. So,  
11 although they're dissatisfied that they didn't get the full  
12 amount they sought approval for, they got substantial payment  
13 including on account of both management fees and distribution  
14 of accrued earnings that they said they were owed, and they  
15 also received a separate license authorizing them to engage in  
16 wind-down operations, negotiations, negotiate and execute sales  
17 of blocked positions.

18 So, they now have a broad prospective license  
19 permitting them to do the management activities of the type  
20 they say they need to do and have been frustrated from doing.  
21 And, in addition to that, they have been told by OFAC that  
22 although they're not being given prospective management fees or  
23 prospective authorizations to receive payouts from these  
24 entities going forward, that OFAC has said they are predisposed  
25 to look favorably on applications for that once the



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1 negotiations they're pursuing close. OFAC just wants to see  
2 that the transactions actually happen and be satisfied that  
3 future payouts are supported by reasonable management costs or  
4 fees or expenses or contractual entitlements of some sort for  
5 the plaintiffs, but they've said they're open to providing  
6 this.

7 THE COURT: Where does one go to look at to know what  
8 standards that OFAC is using in making these determinations?

9 MR. JONES: Let's see. Your Honor, first off, if  
10 you're talking about standards that OFAC applies in deciding  
11 license applications, is that the question?

12 THE COURT: Yes.

13 MR. JONES: Right. So, your Honor, every sanctions  
14 program, including the Ukraine program, has regulations in the  
15 CFR that are published, and, further, there's an OFAC website  
16 with a lot of Q's and A's, and OFAC is available for  
17 consultations.

18 I believe plaintiffs are correct that there is not a  
19 detailed quasi-legislative statement of considerations *and if X*  
20 *happens, OFAC will do Y* and so forth. OFAC has very broad  
21 discretion, and our argument is that that is appropriate and  
22 permissible. It's consistent with the design of IEEPA, which  
23 is the statute under which the sanctions are promulgated, and  
24 which is necessary because the way sanctions work is very  
25 sweeping, and it happens automatically by operation of law.

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1           If someone is subject to sanctions, all property and  
2 rights in property subject to U.S. jurisdiction that they have  
3 is blocked. It can't be bought, sold, transferred, acted on,  
4 moved. It's just frozen in place. The government doesn't  
5 necessarily know what all that is. In fact, it probably  
6 doesn't. And that can have very sweeping and varied effects,  
7 and any number of people will be affected by that. Any of  
8 those people affected by any of those permutations can come to  
9 OFAC for relief, and I -- my inference -- well, I'll just say  
10 it would be unworkable to design a very detailed playbook for  
11 defining the exact situations that might arise and exactly what  
12 OFAC might do. So that's part of my answer. They have broad  
13 discretion, but that's of necessity.

14           The other thing I would say is they are available.  
15 They have been responsive. The complaint demonstrates they  
16 have had repeated discussions with plaintiffs, and so their  
17 concerns they are willing to discuss and make known their  
18 concerns, and they do have a track -- a reasonable track record  
19 that's fairly well-known by practitioners in this area of what  
20 they're willing to do and what they're not.

21           THE COURT: Well, it is still unclear to me where the  
22 two of you have butt heads and where you have come into  
23 conflict over any particular issue.

24           MR. JONES: As to these motions and this case? I'm  
25 trying to talk about --

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1 THE COURT: No, as to any particular thing that they  
2 wanted to do that you either told them they couldn't do or you  
3 have ignored them.

4 MR. JONES: Your Honor, my sense is that OFAC has  
5 worked very hard to preserve the functioning of its sanction  
6 system but also to listen to and meet the concerns of  
7 plaintiffs. I think that plaintiffs are very upset and  
8 aggrieved because substantial time has gone by. Their economic  
9 operations, their business operations, have been severely  
10 impacted because, just like any other counterparty to a blocked  
11 person, all of a sudden they're not able to do the things they  
12 expected to do, and they're not able to collect the money they  
13 thought they would be collecting when they thought they'd be  
14 collecting it. But that means they're a disadvantaged  
15 counterparty. It doesn't mean they've suffered a seizure.

16 And so I will say OFAC has gone a long way to  
17 addressing what it understands the concerns of plaintiffs to  
18 be. It took a long time, and it's not as good as they wanted,  
19 but what they wanted is distribution of management fees to  
20 their pockets, distribution of realized cash proceeds of  
21 transactions by blocked entities to their pockets as those  
22 entities owed them both proceeds to the plaintiffs, and then  
23 they wanted an ability to manage these assets and conduct  
24 wind-down negotiations and transactions because I think your  
25 Honor has it but basically all of these entities are investment

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1 vehicles that Vekselberg owns, most or all of, that plaintiffs  
2 manage. They all hold portfolio assets of some kind or other  
3 that are investments, so probably not cash. I mean, they're  
4 shares in companies or other forms of assets that have to be  
5 managed as investments, ultimately liquidated, and cashed out,  
6 and then the money flows in whatever proportion to Vekselberg  
7 or the plaintiffs.

8 So, that's what all of these things are about. And so  
9 their frustration is they haven't been able to do deals like  
10 they wanted, and they haven't been able to pull their money out  
11 as they're contractually entitled to do.

12 Sorry, so I'm doing a long wind-up. OFAC now has done  
13 licenses that allow these folks to receive a substantial  
14 payment of their management fees, although not all, that is  
15 correct, they're not getting quite full pay, but a substantial  
16 chunk of money. They're also getting money on account of what  
17 OFAC refers to as carried interest, their investment  
18 entitlements flowing from these entities, and they're also  
19 getting authorization to finalize these wind-down negotiations.  
20 OFAC wants these assets liquidated too, and OFAC has told them,  
21 when you do that, we will let you pull further money out, but  
22 we're just not going to give you a front commitment that you  
23 can have X dollars on such and such a timetable. Finish the  
24 negotiations, generate the revenues, get the deals done, and  
25 we'll let you have more money.

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1 I think your Honor's question is well taken that it is  
2 not the case that as we stand here today OFAC is wildly off the  
3 mark and is failing to take reasonable action in response to  
4 plaintiff's concerns. It doesn't satisfy plaintiffs. They  
5 want full pay, not 80 percent pay, and they want advanced --  
6 you know, they want a continuing revenue stream to be approved  
7 without having to wait for post-closing blessing by OFAC. But  
8 that's a very limited and different kind of impact than what  
9 they are describing or suggesting.

10 THE COURT: Is it your understanding that this is a  
11 fight about money owed or is this a fight about money or  
12 property owned?

13 MR. JONES: Money owed, your Honor.

14 In speaking with -- I will tell you, this has  
15 attracted a lot of interest and focus within the Treasury  
16 Department and the OFAC folks. People are working very hard  
17 and very engaged with these plaintiffs and in this case, and  
18 the refrain I hear, and I believe it's correct, is, look, these  
19 plaintiffs are, in our view, dressing up what's happened to  
20 them as a Fourth Amendment seizure of what they call their  
21 property, but we don't think it's that. We think these are  
22 counterparties to blocked entities that are validly blocked.  
23 They don't challenge the validity of the blocking, and they're  
24 understandably frustrated because they've been delayed or  
25 prevented from pulling money that those entities owe them out

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1 into their own pockets. And we get that that is very  
2 frustrating and difficult.

3 But the case law again and again recognizes that  
4 sanctions programs are valid and important. They have impacts  
5 on counterparties that can be harmful and frustrating and  
6 painful, but that is part and parcel of the process. And on  
7 top of that, OFAC is attempting to make accommodations and  
8 facilitate at least partial measures to take care of  
9 plaintiff's worst concerns.

10 I think if there were a particular situation, you  
11 know, one topic of discussion was, gosh, this entity owes real  
12 estate taxes, you know, OFAC is very open to a specific license  
13 application to meet a particular operational need. OFAC is not  
14 out to sabotage these businesses or cause needless  
15 counterproductive ways.

16 OFAC's goal is very simple. They want to impose  
17 blocking regulations according to law. Whatever assets are  
18 blocked, they try to preserve them. They don't want them to be  
19 dissipated. They encourage anyone who is an innocent affected  
20 counterparty to try to get paid out of non-blocked money, money  
21 that their counterparty has available elsewhere because that  
22 leaves OFAC with the pot of assets that it uses as leverage in  
23 trying to negotiate and improve the world or eliminate the harm  
24 that led to the sanctions in the first place.

25 If that's not possible, they'll go case by case and

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1 see -- you know, consider appropriate relief for the affected  
2 non-sanctioned person and sometimes with a sanctioned person  
3 too if they seek it. All of that is a long, established  
4 functioning process and regime. It's available to plaintiffs.  
5 I know they're frustrated and dissatisfied, but their proper  
6 recourse if they're dissatisfied is to pursue what they want  
7 with OFAC. If they get simply no answer and they're  
8 dissatisfied about that, the APA gives them another  
9 non-constitutional avenue to pursue if they want to plead it  
10 that way, which they haven't done, because the APA lets you sue  
11 for unreasonably delayed action. Again, they haven't brought  
12 such a statutory claim.

13 And if you're dissatisfied with a final action agency  
14 action, it has to be a final agency action under 5 U.S.C. 704,  
15 then you can sue saying it's arbitrary and capricious, and our  
16 papers do cite cases where OFAC was sued by various people who  
17 were affected by the sanctions and allege what affected was  
18 arbitrary and capricious, and OFAC won. But the fact that  
19 those lawsuits happened demonstrate a couple of things. One is  
20 that OFAC engages in reasonable decision-making, at least  
21 sufficiently to permit review, and the other is that the Court  
22 should know OFAC understands that it has an obligation to  
23 decide things and be responsive and make responsible defensible  
24 decisions. And OFAC lives at risk of a lawsuit if it makes a  
25 final decision that is contrary to the APA standard and review.

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1           Sorry, that was a horrible sentence. If OFAC does  
2 something arbitrary, capricious or indefensible, OFAC knows  
3 that it's liability to be sued on account of that once its  
4 final action has occurred. So, that procedural right protects  
5 plaintiffs and people and that OFAC living with that knowledge  
6 is an incentive and inducement to make sure that OFAC actually  
7 does reasonable defensible things.

8           So, your Honor, that is -- I feel like we hit a pause  
9 in our conversation, and I hope I've addressed the Court's  
10 questions.

11           THE COURT: You have.

12           MR. JONES: I would like to take a moment and really  
13 hit hard on the question of whether OFAC has done a seizure,  
14 what OFAC has done can constitute a Fourth Amendment seizure,  
15 because that is of very great programmatic importance to OFAC.  
16 And the answer is no.

17           So, we basically have in our briefing talked a lot  
18 essentially about four main cases. There were two out of D.C.,  
19 *HolyLand* and *Islamic American Charity* versus the two that the  
20 plaintiffs favor, one called *Al Haramain* and another one called  
21 *KindHearts*. Those are out of the Ninth Circuit and the  
22 Northern District of Ohio. Those are all on the question  
23 whether OFAC seized somebody's property in the course of  
24 designating, I think those all involved terrorist actors, and  
25 causing all their assets to be blocked.



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1           We think the D.C. cases are correct, but all four are  
2 completely distinguishable and fundamentally different from  
3 what's going on here because those cases all involved the  
4 unusual circumstance of the government designating as a  
5 terrorist and imposing sanctions against a U.S. organization.  
6 They're all U.S.-based organizations on both sides of that  
7 legal debate, and so they had available the argument that, my  
8 gosh, my government, the U.S. Government, came and targeted me  
9 and deemed me a terrorist, renegade outlaw and essentially made  
10 me -- that was like a corporate death sentence immediately  
11 because they couldn't engage in operations. They couldn't  
12 access or use any of their assets. Their operations were  
13 immediately terminated.

14           And for the two courts that come out plaintiff's way,  
15 that was a bridge too far. That was -- like *Soldal*, that was a  
16 government's countenance direct interference with the property  
17 rights of U.S. people so that had to meet Fourth Amendment  
18 requirements.

19           The D.C. courts said recognizing the severity of that  
20 situation, government action has to a U.S. person,  
21 nevertheless, not a seizure because all OFAC does is immobilize  
22 assets, and that doesn't constitute -- rise to the level of a  
23 Fourth Amendment sanction. But -- so, we think the D.C. courts  
24 have the better of that.

25           But, regardless, this situation is different because

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1 plaintiffs were not sanctioned. Vekselberg was sanctioned.  
2 His entities were sanctioned. And then by operation of the  
3 50 Percent Rule's role here was simply to say, oh, what  
4 constitutes Vekselberg's property that is seized -- or, excuse  
5 me -- that is blocked by operation of law once he's has been  
6 sanctioned. And so that is fundamentally different because  
7 there is no governmental action directed at plaintiffs or  
8 anyone but Vekselberg and the effect is different and much less  
9 sweeping.

10 Mr. Intrater, whatever property Mr. Intrater has or  
11 the plaintiff entities have is not blocked. All that's  
12 blocked -- that is, all that is blocked is the entities from  
13 which they're owed money and which they say they have a  
14 minority ownership share or entitlement to receive proceeds.

15 So, that is just a fundamentally different situation.  
16 And to hold that that's a seizure would -- could really just  
17 wreak havoc on the operation of sanctions programs because that  
18 just opens up the possibility that anyone who has any dealings  
19 that would be frustrated with any sanctioned narco trafficker,  
20 terrorist, foreign, you know, rogue foreign official, whatever  
21 it is, any person affected by government action against those  
22 types of actors would have a Fourth Amendment seizure claim and  
23 potentially warrant obligation flowing to the government and/or  
24 very unadministrable and unnecessary procedural avenues would  
25 be opened up.

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1           What they've got is, they are frustrated  
2     counterparties. They are protected by the OFAC licensing  
3     process and by the ability to receive payment from their  
4     counterparties by other sources of funds, and that process  
5     should not be disturbed.

6           Your Honor, I'm not sensing any questions coming. If  
7     I can have a moment to make sure -- the one other thing I want  
8     to touch on is the inapplicability of Criminal Rule 41 to this  
9     situation. We briefed that, but plaintiffs acknowledge  
10    Criminal Rule 41 has never been applied in a context remotely  
11    like this. They insist, and rightly, that some case law  
12    recognizes that if there is no criminal proceeding pending in  
13    which such an application for relief can be brought, the Court  
14    does have authority to deem something a civil equitable  
15    proceeding.

16          But every time -- first off, the Second Circuit says  
17    that should only be done -- in the *DeAlmeida* case that should  
18    only be done sparingly and with extreme caution and can never  
19    be done if there's an available legal remedy, which there is  
20    here under the APA. And it has always been done in connection  
21    with criminal investigations or forfeitures, you know,  
22    potentially in the context of civil forfeiture but always in  
23    the law enforcement context. It's always when law enforcement  
24    takes something, typically tangible property or cash, from a  
25    person and is unlawfully retaining it. Either it couldn't be

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1 taken in the first place or it was held too long, you can get  
2 it back. That is not this. These are all designed to serve  
3 the purpose of protecting people from overzealous  
4 unconstitutional acts in connection with law enforcement  
5 matters and that is simply not this. So, relief under Criminal  
6 Rule 41 should not be afforded in this case even if the  
7 complaint were dismissed. And, of course, if the complaint is  
8 dismissed, there's no proceeding here to append that to.

9 If the Court has no further questions, I think I've  
10 covered the guts of what I wanted to. I thank the Court.

11 THE COURT: Thank you.

12 Mr. Owens, do you have anything further?

13 MR. OWENS: Yes, if I may, your Honor.

14 THE COURT: Sure.

15 MR. OWENS: I think it's important, your Honor, to go  
16 back to what I think appears to be now the central disagreement  
17 between OFAC's view of the world and our view of the world that  
18 we're asking the Court to resolve. That is, whether or not we  
19 are, as OFAC describes it, simply a disgruntled counterparty or  
20 whether we are, as we assert, owners here whose property has  
21 been seized and impacted.

22 Mr. Jones is not correct that we have not alleged our  
23 property interests in the complaint. The complaint alleges in  
24 each instance for each of the investment funds at issue that we  
25 are the general partner. The general partnership interest is

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1 an ownership interest in the fund. Partnership interests are  
2 property and have been recognized as such for eons in the  
3 courts of New York. We are owners of the fund. The ultimate  
4 payout that we may be entitled to is the subject of a  
5 contractual agreement with a limited partner based upon how the  
6 funds performs. But whether or not there is some variability  
7 in our ultimate payment doesn't change our ownership interest.

8 If I own a share of stock in a company, the value of  
9 that stock may change every day, but I have a property interest  
10 in that stock. The same is true for our general partnership  
11 interest here, and that general partnership interest, unlike a  
12 share of stock, comes with additional rights, and those are the  
13 rights of control. Those are the rights that have been  
14 squelched by the 50 Percent Rule. Those are the rights we have  
15 been deprived. Those rights ultimately allow us to either gain  
16 money or lose money based upon our own decisions about how to  
17 run the business, and that's what we've been deprived of by  
18 OFAC.

19 To some extent, your Honor, I think the discussion of  
20 how many licenses have been granted versus how many licenses  
21 haven't been granted is a bit of a red herring. They could  
22 have granted every license that we asked for save one, and if  
23 that one affected our property interests, we would still have a  
24 valid claim and could stand in court and ask the Court to  
25 address that. OFAC can't defend the constitutionality of their

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1 regulatory regime by saying, well, we're pretty good. We're  
2 better than 500. That's not an answer to the constitutional  
3 claim we have raised.

4 By my count, they've only granted 25 licenses rather  
5 than 29. Maybe I'm not counting extensions. He's counting  
6 differently. And some of those licenses involve entities that  
7 are not subjects of this lawsuit but are separately managed  
8 entities that we don't have an ownership interest in and so  
9 have not brought claims of the sort we have brought in this  
10 lawsuit.

11 But, again, if what this case turns on is, as  
12 Mr. Jones seems to suggest, whether or not OFAC is doing a good  
13 enough job rather than whether or not their application  
14 process, their blocking process meets as a matter of law  
15 constitutional requirements, then it seems to me his motion to  
16 dismiss is doomed because then we're remitted to discovery and  
17 a hearing on the facts to determine whether or not what  
18 Mr. Jones says about how good or reasonable OFAC has been is  
19 true or not.

20 I don't think we have to go there because I think your  
21 Honor can resolve the case on grounds set out in our Rule 41  
22 motion application because we show that any way you slice it,  
23 the application of the 50 Percent Rule to American owners with  
24 no prior judicial finding of fact is unreasonable and  
25 unnecessary, because there is no reason to treat 50 percent

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1 co-owners different from 49 percent co-owners. It's not  
2 necessary to protect OFAC's policy that the duration -- because  
3 there's no limitation on how long they can sit on a license,  
4 even if it's just one license out of many applications is still  
5 a violation of the Fourth Amendment, because the extent of the  
6 seizure has to be reasonable temporally as discussed in  
7 multiple cases that we've cited to the Court. And, most  
8 fundamentally, this sanctions program does not comport with the  
9 rule of law as it affects the rights of Americans because there  
10 is no promulgated standard for decision-making by the  
11 administrative agency.

12 Your Honor very pointedly asked Mr. Jones to point you  
13 in the direction, he mentioned websites. He mentioned OFAC's  
14 program guidelines. He didn't give you a cite, and, most  
15 tellingly, your Honor, he didn't articulate what that standard  
16 would be even if he didn't know the cite, and that's because  
17 there is not one. OFAC has broad discretion that when it comes  
18 to restraining Americans' ability to use and enjoy their own  
19 property, even when it's a minority interest in property, is  
20 far too broad than the Constitution permits.

21 I want to just respond briefly to the point about Rule  
22 41. This is a novel request to address this issue in a context  
23 of a motion brought under Rule 41. The Second Circuit has  
24 acknowledged and recognized that Rule 41 can be used in civil  
25 proceedings where the owner of the property is not subject to a

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1 criminal indictment and, therefore, can't contest seizure in a  
2 pending criminal case. I see no reason that the Court, and  
3 I've heard none articulated by the government today, why the  
4 same principles that animated the drafters of Rule 41 to  
5 provide for an expedient remedy to return property and the  
6 Second Circuit in determining that that remedy is available to  
7 those who are not under criminal indictment should not be  
8 available to Mr. Intrater here.

9 And it's not as if, as Mr. Jones said, Rule 41 is only  
10 available to cure unreasonable searches and seizures and  
11 extraordinary narrowly inappropriate government activity. Rule  
12 41 has often traditionally been used in a very mundane case  
13 where the government has executed a perfectly legitimate search  
14 warrant, taken someone to trial based on the evidence seized in  
15 that warrant, convicted the person at trial, and just lost or  
16 dithered and never bothered to get around to giving back to the  
17 person from whom the property was seized in the search their  
18 property back.

19 That sort of mundane issue is in many respects what  
20 we're dealing with here. OFAC needs to give us our property  
21 back, and we should be provided a rapid remedy to get a court  
22 to rule on that. The government can't demonstrate, and still  
23 hasn't demonstrated, why they won't let us run it and get it  
24 back, why it still has to be treated as if Vekselberg owns the  
25 entirety of the corpus of the investment funds. And absent



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1 that, we ought to get our property back, and we ought to be  
2 able to manage it in the way we see fit so long as we do not in  
3 any circumstances remit any share of the benefits back to an  
4 SDN. That is sufficient for OFAC's purposes here.

5 This is not a remedy, if granted here, that would open  
6 the flood gates to -- and otherwise imperil or impair OFAC's  
7 overall ability to exercise its programs and to restrain the  
8 activities of foreigners, narco traffickers, and terrorists.  
9 All we are asking for, your Honor, is that we not be held  
10 unnecessarily hostage to that effort. That's what OFAC's  
11 50 Percent Rule, that's what the absence of a standard for  
12 deciding license applications, that's what the absence of a  
13 time limit for acting on it imposes on American citizens; we  
14 become hostages to the government's programs against  
15 foreigners. And while it may be OK to hold us hostage for  
16 awhile while they will get everything sorted out, two years and  
17 three months to today is too long. For that reason, your  
18 Honor, I respectfully request the Court grant our motion for  
19 the return of our property so that we can get on with our  
20 business.

21 I also ask that the Court deny the government's motion  
22 to dismiss. And if the Court has serious concerns that we  
23 have -- that our claim should be dismissed for having failed to  
24 exhaust administrative remedies, I would request that your  
25 Honor give us an opportunity to submit supplemental briefing

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1 about why we don't think that's required in order to preserve  
2 the constitutional claims that we've asserted in our lawsuit.

3 Thank you, your Honor

4 THE COURT: Thank you, Mr. Owens.

5 Gentlemen, thank you. I will try to get back to you  
6 as quickly as possible. This has been helpful. I want to get  
7 a copy of the transcript, and I will go back through the  
8 documents.

9 MR. OWENS: Thank you, your Honor.

10 MR. JONES: Thank you, your Honor.

11 (Adjourned)